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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 428

EL DORADO OIL WORKS AND EL DORADO TERMINAL COMPANY, APPELLANTS

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND GENERAL AMERICAN TRANSPORTATION COMPANY, ET AL.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

OPINIONS BELOW

The opinion of the specially constituted district court (R. 33–36) is reported in 59 F. Supp. 738. The report of the Interstate Commerce Commission (R. 237–255) appears in 258 I. C. C. 371.

JURISDICTION

The final decree of the district court was entered on April 9, 1945 (R. 40). The petition for appeal was filed on June 1, 1945, and the appeal

was allowed on the same day (R. 41). Probable jurisdiction was noted on October 15, 1945 (R. 267). The jurisdiction of this Court rests on the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 220 (28 U. S. C. 47a), and Section 238 of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, 938 (28 U. S. C. 345).

QUESTIONS PRESENTED

Whether the three-judge district court had jurisdiction to review the Interstate Commerce Commission's action upon questions arising in an ordinary action in assumpsit, the questions having been held by this Court to be questions committed to the Commission's administrative judgment.

A subordinate question is whether the Commission proceeded upon a misconception of the questions this Court submitted to it and which this Court expected it to determine.

STATUTES INVOLVED

The pertinent statutory provisions involved are set forth in the Appendix, *infra*, pp. 40–43.

STATEMENT

This is a direct appeal from the final decree of a specially constituted District Court for the Northern District of California, dismissing a suit brought by the appellants to set aside certain action of the Interstate Commerce Commission.

The action was taken by the Commission in *Allowances for Privately Owned Tank Cars*, 258 I. C. C. 371 (R. 237), which proceeding was instituted in response to this Court's decision in *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U. S. 422, to determine the lawfulness of certain practices with reference to the rental of tank cars.

Appellant El Dorado Terminal Company is a wholly owned subsidiary of appellant El Dorado Oil Works (hereinafter called the Oil Works), which is a corporation engaged in processing coconut oil from copra in plants at Berkeley and Oakland, California, and shipping the product in tank cars in interstate commerce. The General American Transportation Corporation (hereinafter called the Car Company) is a "private car line" rather than a common carrier and is the owner of numerous railroad cars, including tank cars, which it rents or leases to various shippers for the transportation of their products. (R. 238.)

On September 28, 1933, the Car Company and the Oil Works entered into an agreement under which the former leased to the Oil Works 50 tank cars, designated as "permanent" cars, at a rental of $27.50 per car per month. This lease, a renewal of a previous one, was for the three-year period from January 1, 1934, to December 31, 1936. The Car Company agreed to supply the Oil Works with such additional tank cars as it might need for the shipment of its products,

these additional cars to be ordered by the Oil Works from the Car Company from time to time, as needed. The rental for the additional cars was at the rate of $30 per car per month for the time such cars were in the service of the Oil Works. (R. 52–57.)

The agreement provided that the Car Company would collect from the railroads all mileage earned by the cars covered by the agreement and "each month credit to the rental or service account" of the Oil Works "all mileage earned by said cars while in the service of the Oil Works "according to and subject to all rules of the tariffs of the railroads" (R. 55–56).

The tariffs of the railroads, though publishing a general provision for the payment of 1½ cents per car per mile, both loaded and empty, for the use of tank cars of private ownership, contained rules governing the application of the provision which precluded payment of the mileage to the Oil Works under the circumstances of this case. The rules, in effect throughout the period here in question, provided *inter alia* that the mileage would be paid only to the "party" whose "reporting marks" appeared on the cars. (R. 110.) It was specially provided in the agreement that all the cars covered thereby should bear the reporting marks of the Car Company (R. 52). The mileage was not, therefore, under the terms of the tariff, payable to the Oil Works.

The terms of the agreement were observed for a period of approximately six months or until

July 2, 1934, on which date the Commission rendered its decision in *Use of Privately Owned Refrigerator Cars,* 201 I. C. C. 323, 378–381, in which it held that the payment in whole or in part to shippers of mileage allowances by railroads, either directly or through car owners, in excess of the amount of rental such shippers pay for the use of the cars and other actual expenses in connection therewith, results in such shippers receiving transportation of their products at lower rates than those paid by shippers generally who use cars furnished by the carriers, and at less than the published rates (R. 239).

After the issuance of this decision by the Commission, the Car Company refused to credit or pay over to the Oil Works any part of the mileage allowances in excess of the rental reserved in the lease. Until that time the practice had been for the Car Company to collect the mileage, deduct the rental due, and pay the balance to the Oil Works. Thereafter, the Car Company collected the mileage from the railroads, credited the Oil Works with the amount of the rental due, and retained the balance, refusing to pay it over to the Oil Works on the ground that if it did so it would be the instrumentality for the granting of unlawful concessions or rebates to the Oil Works. It appears that both before and after the change in the practice, the aggregate of the mileage earnings each month exceeded the rental due from the Oil Works. Throughout the entire

period, therefore, the Oil Works paid nothing to the Car Company for the use of the cars. (R. 234, 239.)

In June 1935, the El Dorado Terminal Company, as assignee of the Oil Works (its parent company), brought suit against the Car Company in the United States District Court for the Northern District of California to recover the unpaid excess mileage earnings which had accrued from the use of the leased cars up to May 31, 1935. The amount claimed was $18,532.78. Judgment for the Car Company was rendered by the district court, but was reversed on appeal by the Circuit Court of Appeals, which held (104 F. 2d 903) that the Terminal Company was entitled to the full amount claimed. This Court granted certiorari and subsequently held in *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U. S. 422, that the "question of the reasonableness and legality of the practices of the parties was subjected by the Interstate Commerce Act to the administrative authority of the Interstate Commerce Commission," and that "when it appeared in the course of the litigation that an administrative problem, committed to the Commission, was involved, the court should have stayed its hand pending the Commission's determination of the lawfulness and reasonableness of the practices under the terms of the Act." The judgment of the Circuit Court of Appeals was reversed and the cause remanded to the District

Court to be there held "pending the conclusion of an appropriate administrative proceeding" by the Commission (308 U. S. at p. 433). (R. 239–240.)

Pursuant to a petition subsequently filed with it by the Oil Works and its assignee (R. 43–52), the Terminal Company, the Commission instituted an investigation to determine (258 I. C. C. 371, 374):

> (1) whether the practices involved under the terms and operations of the lease contract are unlawful in violation of the Interstate Commerce Act;
>
> (2) whether a reasonable charge or allowance may be paid, and, if so, the amount thereof as a maximum to be paid, by the carrier or carriers by railroads for the use of the tank cars furnished such carriers by petitioners for the transportation of the products of petitioners in interstate commerce from Berkeley and Oakland, Calif., in the period January 1, 1934, to December 31, 1936; and
>
> (3) what findings shall be made, or what rules, regulations, or practices shall be prescribed, or what orders shall be entered, to remove any unlawfulness that may be found to exist. (R. 58.)

Numerous common carriers by rail were made respondents in the proceeding (see R. 241). Following a hearing (R. 59–233), in which the said respondents and the Car Company participated,

the Commission issued its report (R. 237–255). The Commission therein reviewed the action of the courts, considered in the light of the record made in the administrative proceeding the reasonableness and legality of the practices involved, and made findings in respect thereof, all in compliance with the direction of the Supreme Court in the *El Dorado Terminal Co.* case that the Commission's administrative judgment in the premises be obtained. At the conclusion of its report the Commission discontinued the proceeding after stating its conclusions as follows (258 I. C. C. at pp. 380–381):

> (1) That the rental paid or to be paid by El Dorado Oil Works to General American Tank Car Corporation [now the General American Transportation Corporation] under the terms of the lease agreement between those parties, dated September 28, 1933, was the only cost incurred by the former in furnishing the tank cars in which its shipments moved. A just and reasonable allowance as a maximum to have been paid by the respondents, rail carrier or carriers, to the Oil Works for the furnishing of such cars would have been an amount not to exceed such rental. Such an amount and allowance has been paid to the Oil Works through credits made to the account of the Oil Works by the Tank Car Corporation.
>
> (2) That an allowance to the Oil Works by the respondents, rail carrier or carriers,

or by the Tank Car Corporation, under the agreement, in excess of said rental would be unjust and unreasonable, and would unduly prefer the Oil Works as a shipper of its commodities transported by it in the tank cars herein involved. The amount paid by the Tank Car Corporation to the Oil Works prior to July 1, 1934, under the terms of the agreement, to the extent it was in excess of the rentals due thereunder, was unjust and unreasonable, and unduly preferred the Oil Works as a shipper of its commodities.

(3) That the Oil Works is entitled to no allowance from the respondents, rail carrier or carriers, directly or through the Tank Car Corporation, for the special cleaning and preparation of the tank cars during the period of the agreement, January 1, 1934, to December 31, 1936. (R. 249–250.)

Appellants thereupon brought this suit under the Urgent Deficiencies Act; they assumed and contended that the findings of the Commission, above described, coupled with its order discontinuing the proceeding (R. 260–261), constituted an "order" within the meaning of that Act[1] and asked that the same be enjoined and set aside on the grounds, primarily, of lack of substantial evi-

[1] Three-judge district courts (28 U. S. C. 47) have jurisdiction of "cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission" (28 U. S. C. 41 (28)).

dence. The United States and the Commission defended on the merits, but also insisted that the District court, specially constituted as a court of three judges, was without jurisdiction. In dismissing the complaint, the three-judge court sustained the latter contention, saying in part (R. 35–36) that—

> By its finding and determination with respect to the practice here involved, the Interstate Commerce Commission made no decision which required any party to the proceeding before it to do or not to do any specific act. It followed the directions of the Supreme Court (*General American Tank Car Corp.* v. *El Dorado Terminal Co., supra* [308 U. S. 422]) and determined, under the Interstate Commerce Act, the lawfulness and reasonableness of the practice which had obtained between plaintiff and the tank car company. When this was done, its job was done. It was not required to make any order and made none, and having completed its work, stamped "finis" thereon and discontinued the proceeding. Hence there is no order, in the sense contemplated in the statute, requiring review by this court (*U. S.* v. *Griffin*, 303 U. S. 226, 233; *U. S.* v. *Ill. Central R. R. Co.*, 244 U. S. 82; *D. & H. Co.* v. *U. S.*, 266 U. S. 438; *U. S.* v. *L. A. Ry. Co.*, 273 U. S. 299.) [2]

[2] None of these four cases was overruled by *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125. See 307 U. S. at pp. 130, 131, 135; see also *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297, 301; *Chicago & North West-*

Past transactions between plaintiff and defendant constitute the subject matter of the assumpsit action now pending in the District Court. This is not a case of a presently existing practice declared unlawful by the Commission. Consequently there does not arise the right to apply for the equitable or injunctive relief provided by the statute to protect against irreparable damage.

The procedure specified by the Supreme Court in *General American Tank Car Corp.* v. *El Dorado Terminal Co., supra,* has been followed. The administrative practice involved has been passed upon by the Interstate Commerce Commission. The parties may now proceed in the assumpsit action. Therein, in our opinion,

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ern Ry. Co. v. *United States*, 320 U. S. 718. An excerpt from Mr. Justice Brandeis' opinion in the *Griffin* case is particularly relevant (303 U. S. at p. 233):

"In the opinion of Congress jurisdiction with the extraordinary features of the Urgent Deficiencies Act was justified by the character of the cases to which it applied—cases of public importance because of the widespread effect of the decisions thereof. In such cases Congress sought to guard against ill-considered action by a single judge and to avert the delays ordinarily incident to litigation. In construing the Act, this Court concluded that despite the broad language used in the Commerce Court Act, Congress could not have intended to include in this special jurisdiction suits to set aside every kind of order issued by the Commission. For substantially every decision, and every other kind of action by the Commission is expressed in, or is followed by, an order; and many of the orders are obviously not of such public importance and widespread effect as to justify, in cases affecting them, the extraordinary features of the Urgent Deficiencies Act."

> the court may determine plaintiff's cause and upon tender thereof, any competent defenses thereto.

Earlier in its opinion, the court below pointed to the fact that the procedure specified by this Court was not new (R. 34). Following its statement that the *El Dorado Terminal Co.* case (308 U. S. 422) held that the one-judge court in the assumpsit action should have stayed its hand until the Commission had passed on the administrative question involved, the court below said, "In so holding, the Supreme Court followed a like procedure which it earlier had invoked in *Mitchell Coal & Coke Co.* v. *Penna. R. Co.*, 230 U. S. 247" (R. 34).

SUMMARY OF ARGUMENT

A. The three-judge district court correctly ruled that its jurisdiction under the Urgent Deficiencies Act over suits to enjoin and set aside orders of the Commission did not extend to the suit brought by appellants to enjoin the action of the Commission here involved. The special injunctive jurisdiction under the Urgent Deficiencies Act applies to orders of the Commission only (28 U. S. C. 41 (28)) and not to the enjoining of mere findings and conclusions reached by the Commission. Here the Commission's action consisted of findings and conclusions and an order simply discontinuing its proceeding. Such an order is merely a procedural step indicating the closing of docket. This is shown

both by its phraseology and by the fact that it cannot, compatibly with the Commission's findings and the subject matter involved, be regarded as an order of dismissal or other "negative order." The Commission's findings here are neither adapted to nor intended for carrying out by orders of its own and no such order was made.

While, in *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U. S. 422, this Court held that there were questions involved in the assumpsit action which had to be determined by the Commission, it further held that the single-judge court before which the action was pending had jurisdiction of the subject matter—the lease agreement—and of the parties. The Commission's action in determining the questions referred to it was merely an ancillary step in the assumpsit case and did not constitute a reviewable order. The Commission did only what was needed to enable the court to perform its functions, and there is no reason for treating the Commission's action as an order.

As pointed out by this Court in the *El Dorado Terminal Co.* case, the situation here is like that involved in *Mitchell Coal Co.* v. *Pennsylvania R. Co.*, 230 U. S. 247, where, in connection with the question of reasonable allowances arising in a lawsuit, this Court held that the question was one for the Commission. Referring to that case, this Court said, "There should not be a dismissal, but, as in *Mitchell Coal Co.* v. *Pennsylvania R. Co.*,

supra, the cause should be held pending the conclusion of an appropriate administrative proceeding. Thus any defenses the petitioner [Car Company] may have will be saved to it." (308 U. S. at p. 433.) From this latter statement, it would appear that the Car Company might urge in defense in the assumpsit action the usual grounds for review of administrative determinations, namely, that the Commission's determinations are beyond its authority and without support of adequate findings and evidence.

The decisions in *Shannahan* v. *United States*, 303 U. S. 596, and in *Shields* v. *Utah Idaho R. Co.*, 305 U. S. 177, taken together, show both that the Commission's mere findings and determinations are not reviewable under the Urgent Deficiencies Act and that the proper place for their review is in the court where the questions determined are in issue.

B. Contrary to the contentions of appellants, the Commission, in determining the question of reasonable allowances due the Oil Works for cars furnished the carriers in the past rather than the question of reasonable allowances for the future to be published in the carriers' tariffs, did not proceed under a misconception either of its statutory authority or of what was expected of it by this Court. In those portions of its *El Dorado Terminal Co.* opinion dealing particularly with the administrative questions involved in the assumpsit action, this Court obviously was speaking

of the question of allowances due the Oil Works for past transactions.

The appellants, in insisting that the Commission could only prescribe allowances for the future and that such action was what was expected of it by this Court, contend that the question of the lawfulness of allowances for the past was a judicial question for the courts, and, therefore, that this Court's opinion could not mean that the latter question was for the administrative judgment of the Commission. In referring to the question committed to the Commission, the Court makes entirely plain that the source of the Commission's jurisdiction was the authority lodged with it under the Interstate Commerce Act to guard against rebates by determining the maximum reasonable allowances payable to shippers out of the rates. Section 15 (13) (Appendix, *infra*, p. 41).

ARGUMENT

THE DISTRICT COURT CORRECTLY RULED THAT THE COMMISSIONS ACTION DID NOT CONSTITUTE AN ORDER REVIEWABLE UNDER THE URGENT DEFICIENCES ACT

A. THE ACTION OF THE COMMISSION WAS MERELY AN ANCILLARY STEP IN THE PENDING ASSUMPSIT CASE AND WAS REVIEWABLE ONLY BY THE ONE-JUDGE DISTRICT COURT

The action of the Interstate Commerce Commission in the investigation conducted by it pursuant to the decision in *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U. S. 422,

was, we submit, merely an ancillary step in the pending action of assumpsit brought by the Oil Works against the Car Company. This Court directed that the assumpsit court should stay its hand pending a determination by the Commission of the administrative question as to the amount, if any, of the allowance to be paid to the Oil Works as reasonable compensation for facilities supplied by it to the carrier. The Commission, in making its determination that the maximum permissible allowance would be the cost of renting the cars from the Car Company and that any allowance in excess thereof would constitute an unjust preference or rebate, was simply facilitating the conduct of the assumpsit action by performing a task referred to it in the course of the pending lawsuit.

In the *El Dorado Terminal Co.* case, this Court held that, the action being one in assumpsit on a written instrument, the lease agreement, the single-judge district court had jurisdiction of the subject matter and of the parties. While the money for which the Oil Works sued was not in the custody of the court, it was, nevertheless, money which the court, because of its jurisdiction over the agreement and the parties, could reach by its judgment or orders, whereas the Commission could not. The Commission could aid the court by determining the reasonable amount of allowance to which the Oil Works was entitled for the cars it had furnished the railroads in connection with its shipments.

But it is clear that the Commission did not itself undertake to give effect to its determination and findings by making any order requiring the payment of money, or the performance of any other act, either by the Car Company or by the carriers. Nothing purporting to give effect to that determination or those findings is contained in the Commission's order discontinuing the proceedings.[3] That order, as its phraseology discloses, was merely a procedural step indicating that the docket was closed. Since all that was required of the Commission, in order to enable the court in the assumpsit action to exercise its jurisdiction and perform its functions, was that the Commission determine the lawfulness of the prac-

[3] The order reads as follows (R. 260–261):

"*It appearing*, That by order dated July 24, 1940, the Commission, in response to a joint petition filed by El Dorado Oil Works and El Dorado Terminal Company, instituted and [an] investigation to determine the lawfulness of the practices under the terms of a contract dated September 28, 1933, between the El Dorado Oil Works and the General American Tank Car Corporation, and the reasonableness of the allowance to be paid by carriers by railroad for the use of tank cars furnished such carriers by the El Dorado Oil Works for the transportation of its products in interstate commerce during the period from January 1, 1934, to December 31, 1936:

"*It further appearing*, That a full investigation of the matters and things involved has been had, and that the parties have been fully heard, and that the Commission, on the date hereof, has made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

"*It is ordered*, That the proceeding be, and it is hereby, discontinued."

tices and the just and reasonable allowance, if any, due the shipper, there is no occasion or reason for treating the findings and determinations as an order reviewable under the Urgent Deficiencies Act, rather than action in aid of the single-judge assumpsit action. As the court below said, the Commission "was not required to make any order and made none" (R. 35).

While the appellants do not expressly concede that, if all that was required of the Commission and all that it did was to make administrative determinations of the ancillary sort just described, its action would not be reviewable under the Urgent Deficiencies Act (Br. 9–12), their principal argument is apparently that the determinations made by the Commission were not simply ancillary administrative determinations and that they were not the determinations which the Court expected and the statute authorized the Commission to make (Br. 13–17).

As grounds for setting aside the Commission's determinations the appellants assert, *inter alia*, that the determinations are confiscatory and beyond the Commission's statutory authority (R. 4, Br. 14, 15). However, since, as held by the court below, the action taken by the Commission was that specified by this Court in the *El Dorado Terminal Co.* case and was merely an ancillary step in the assumpsit action, the logical and intended forum for the review thereof was the single-judge court before which the assumpsit action was pending.

As shown by the decisions cited in the opinion below, the jurisdiction conferred on three-judge district courts by the Urgent Deficiencies Act (28 U. S. C. 47) was designed for judicial review only of the Commission's orders of real substance. Although the jurisdiction conferred in terms covers suits to enjoin "any order of the Interstate Commerce Commission" (28 U. S. C. 41 (28)), such jurisdiction has not only been held not to extend to mere findings and determinations in a report of the Commission (*United States* v. *Atlanta, B. & C. R. Co.*, 282 U. S. 522; *Shannahan* v. *United States*, 303 U. S. 596) but also not to be applicable to all orders of the Commission, it having been pointed out (*United States* v. *Griffin*, 303 U. S. 226, 233) that practically every step taken by the Commission is preceded by the words "it is ordered."

It is true that "negative orders" such as were involved in *Procter & Gamble Co.* v. *United States*, 225 U. S. 282, constitute the largest class of orders which in the past have been held not to be reviewable and that the doctrine that such orders are not reviewable has been overturned. *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 142; *United States* v. *Maher*, 307 U. S. 148. However, the decision in the *Rochester Telephone Corp.* case applies only to "negative order" cases and, in fact, expressly distinguishes (p. 130) such cases as *United States* v. *Illinois Cent. R. R. Co.*, 244 U. S. 82; *United States* v. *Los*

Angeles R. R. Co., 273 U. S. 299; and *Shannahan* v. *United States*, 303 U. S. 596.

The order of discontinuance here involved simply indicates that the docket was closed and is an order of no more force and effect than the notice (termed an order) of hearing involved in *United States* v. *Illinois Cent. R. R. Co.*, 244 U. S. 82. Such order cannot, compatibly with the Commission's findings and the subject matter involved, be regarded as an order of dismissal or other "negative order" such as is now reviewable under the three-judge court rule. While, as held by this Court in the *El Dorado* case, the shipper here was entitled to a reasonable allowance, the emphasis laid by the Court, and by the Commission throughout, is on the Interstate Commerce Act's requirement (sec. 15 (13)) that such allowance shall not amount to excessive compensation to the shipper and thus constitute an illegal rebate. It is to the prevention of this that the Commission's findings are directed. If the Commission had intended to give effect thereto by an order of its own, directed either to the parties to the agreement, or to the carriers, such order would not have been one merely discontinuing the proceeding but would have been an order which, conformably to the issues and the findings, would have affirmatively forbidden the payments called for by the agreement, and required adjustment to the basis of the maximum amount of allowances to which the Commission found the shipper to be lawfully entitled.

It is evident that the Commission's findings were neither adapted to, nor intended for, carrying out by orders of its own, whether affirmative or negative. Although the Commission, by its findings, authoritatively fixed the reasonable amount of allowance payable to the shipper Oil Works, it was without authority to enter affirmative orders directing the payment thereof either by the Car Company or by the carriers. The Car Company was not subject to the Commission's authority in any respect. See the *El Dorado Terminal Co.* case, 308 U. S. at p. 428. An order directing the carriers to pay the reasonable allowance found due was equally beyond the Commission's authority, for, even if the shipper's petition to the Commission were to be regarded as a complaint asking for an award of reparation, the period of time within which such a complaint could be filed had long since lapsed.*

The shipper's petition to the Commission was not a complaint invoking the Commission's au-

* Since, as held in the *El Dorado Terminal Co.* case, 308 U. S. at p. 431, it was the shipper (the Oil Works) and not the Car Company, which furnished the cars to the railroads, the shipper might (except for its agreement with the Car Company) have complained to the Commission and sought an award of damages (sec. 8 of the Interstate Commerce Act; see also *Paragron Ref. Co.* v. *Alton & S. R. R.*, 118 I. C. C. 166, 168). The time within which such a complaint may be filed is limited to two years (sec. 16 (3) (b)), and such provision of Section 16 "is not a mere statute of limitation but is jurisdictional." *Louisville Cement Co.* v. *Interstate Commerce Commission*, 246 U. S. 638, 642. Here the petition was not filed until 1940 although the cause of action accrued in 1934.

thority independently of the action in assumpsit in the district court. The shipper (Oil Works) was a party to the lease agreement with the Car Company and, based on the agreement, it brought the action in assumpsit. The bringing by the shipper of a lawsuit to recover the mileage allowances to which it claimed to be entitled negates any possibility that its petition to the Commission was a complaint for recovery directly through the Commission upon its claim for the same mileage allowances. In any event, it is evident on the face of the pleadings that the shipper's petition to the Commission (258 I. C. C. at p. 373) was not an independent complaint, but was filed responsive to this Court's holding and instructions in its decision on certiorari in the court action in assumpsit brought by the shipper. See the *El Dorado Terminal Co.* case, 308 U. S. at p. 433.

As already stated, this Court, on certiorari in the assumpsit action in the *El Dorado Terminal Co.* case, held that the district court had jurisdiction of the lease agreement and of the parties. The Court's only qualification was that the district judge should have stayed his hand until the Commission had passed on the administrative questions involved. "There should not be a dismissal," the Court said, "but, as in *Mitchell Coal Co.* v. *Pennsylvania R. Co., supra* [230 U. S. 247], the cause should be held pending the conclusion of an appropriate administrative proceeding. Thus any defenses the petitioner [Car Company]

may have will be saved to it." (See the *El Dorado Terminal Co.* case, 308 U. S. at p. 433.) In the *Mitchell Coal* case, 230 U. S. 247, the Supreme Court expected the Commission only to make a determination or "ruling as to the reasonableness of the practice and the allowance involved" (*ibid.*, p. 267), and the Commission, in responding thereto, made such a ruling apparently without an accompanying order. *Mitchell Coal & Coke Co.* v. *Penna. R. R. Co.*, 38 I. C. C. 40, 50. Thereafter, the case did not require further resort to the district court, but, if it had, the language at the end of this Court's decision (230 U. S. at p. 267) shows that the defendant would have had "the right to be heard on its plea of the statute of limitations as of the time the suit was filed and any other defense which it may have." Under this language it would seem that the defendant, in such case, might have urged in defense the usual grounds for review of administrative determinations, *viz.*, that the Commission's ruling was beyond its authority, without support in the evidence or otherwise arbitrary.

It was clearly recognized in *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 132, and *Columbia Broadcasting System, Inc.* v. *United States*, 316 U. S. 407, 415, that a suit cannot be maintained under the Urgent Deficiencies Act unless the complaint states a cause of action in equity. It is elementary that the requisites of equity jurisdiction are lacking where there is

an adequate legal remedy, or where the complainant is not faced with any immediate threat of interference with its rights. This Court's opinion in the *El Dorado Terminal Co.* case seems to imply that the same limited review of the Commission's action ordinarily obtainable before a three-judge court should be obtainable with respect to the instant "order" in the pending proceedings at law before a single judge, for it stated that "any defenses the petitioner [Car Company] may have will be saved to it." The Court said, too, that the one-judge proceeding should be held up "pending the conclusion of an appropriate administrative proceeding," apparently indicating that, once the Commission reported, only the one-judge court was to proceed. (See 308 U. S. at pp. 432–433.) As in *Shields* v. *Utah Idaho R. Co.*, 305 U. S. 177, we believe that the present action of the Commission is reviewable only in the one-judge proceeding. Since the appellants would have an adequate remedy through a review of the Commission's action in the one-judge proceeding and since the Commission's action here cannot pose an immediate threat to appellants' rights until the one-judge court has passed upon its validity, the appellants have failed to satisfy the conventional requirements of equity jurisdiction.

In *United States* v. *Atlanta, B. & C. R. Co.*, 282 U. S. 522, this Court pointed out that the Commission had various duties and functions,

which, while "calling" for findings and determinations, did not "call" for orders, and, although the Court did not specifically refer to situations of administrative rulings necessary to lawsuits, such situations fall clearly within the same principles. The decisions in *Shannahan* v. *United States*, 303 U. S. 596, and in *Shields* v. *Utah Idaho R. Co.*, 305 U. S. 177, taken together, show both that the Commission's mere findings and determinations are not reviewable under the Urgent Deficiencies Act and that the proper place for their review is in the court where the questions determined are in issue. Accordingly, we maintain that the Commission's action here can be reviewed only in the one-judge district court trying the assumpsit action.

B. THE ACTION OF THE COMMISSION DID NOT CONSTITUTE A DECISION OF THE ASSUMPSIT CASE AND A USURPATION OF JUDICIAL FUNCTIONS

As is shown by this Court's decision in the *El Dorado Terminal Co.* case, the questions arising in the action in assumpsit and committed to the Commission involve basically the provisions of Section 15 (13) of the Interstate Commerce Act (Appendix, *infra*, p. 41), whereby authority is placed with the Commission to determine after hearing questions as to what constitute just and reasonable allowances payable to shippers furnishing services or instrumentalities in connection with their shipments. While the appellants recognize apparently that this is the statutory provi-

sion particularly pointed to in the *El Dorado Terminal Co.* case as entitling the shipper to allowances and as committing to the Commission the question as to the just and reasonable amount thereof (Br. 13, 15), they nevertheless seem to contend that this Court was there referring to the question of the proper amount of future allowances[5] and not the question involved in the assumpsit action of the lawfulness of the allowances for past transactions (see Br. 15, 16). They urge that the only authority lodged with the Commission by Section 15 (13) is over questions as to future allowances; that questions as to allowances for the past are judicial questions for the courts and made such by the Elkins Act; that this was recognized in the assumpsit action, because the only defense therein advanced by the Car Company was one raising issues under the Elkins Act[6] and because this Court held (308 U. S. 422) that the single-judge district court had jurisdiction of the assumpsit action; and that, while this Court further held that the district court should have stayed its hand pending determination by the Commission of the administra-

[5] The appellants' petition (R. 43–52) to the Commission neither made such contention nor asked the Commission to prescribe allowances for the future (see 258 I. C. C. at p. 373).

[6] The Car Company's defense was that, if it were to pay over to the Oil Works the full amount of allowances provided for in the lease agreement, it would be the instrumentality for the granting of rebates in violation of Section 1 of the Elkins Act (Appendix, *infra*, pp. 41–43).

tive question involved in the application of Section 15 (13); it did not intend to submit to the Commission the determining of such questions as the lawfulness of allowances for past transactions. Accordingly, the appellants insist that the action of the Commission was not merely an ancillary administrative step in the assumpsit action but, instead, constituted a decision of that action and usurpation of the judicial functions of the judge before whom it was pending. (See Br. 5, 11, 13, 15.)

In the *El Dorado Terminal Co.* case (308 U. S. at p. 429), this Court explained that shippers requiring a specialized form of freight car for transportation of their products frequently rent the cars from car companies and then furnish them to the railroads. For so supplying the cars used in transporting its products, a shipper is entitled to an allowance from the railroads out of the rates which it pays for the transportation. Any such allowance which would more than compensate the shipper for the expense to which he is put would result in his obtaining transportation at lower cost than shippers generally under the rates and thus amount to a rebate.[7] Section 15 (13) of the Interstate Commerce Act (Appendix, *infra*, p. 41), while authorizing allowances

[7] The significance of a provision requiring a hearing by the Commission as showing Congress' intention to commit a question to the Commission rather than to leave it with the courts is shown in *Shields* v. *Utah Idaho R. Co.*, 305 U. S. 177, 181–182.

to shippers furnishing services or instrumentalities in connection with their shipments, specially provides that such allowances "shall be no more than just and reasonable, and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers * * *." (See 258 I. C. C. 371, 378.)

In *In re Private Cars*, 50 I. C. C. 652, the Commission, following a general investigation into the practice whereby shippers requiring special types of freight cars obtained and furnished such cars for the transportation of their products, found that the practice was not unlawful but worked to the benefit both of shippers and carriers. In connection with privately owned tank cars so furnished to the railroads, the Commission therein prescribed as compensation to the shipper an allowance of 1 cent a mile. As the report in that case shows, this allowance was based on the average cost of car ownership, consisting of such fairly consistent items as interest on investment, depreciation and the like.[8] In its later report in the

[8] In its report in the present case (258 I. C. C. at p. 379), the Commission refers to its report in *In re Private Cars*, 50 I. C. C. 652, saying we there "found that a reasonable allowance for the use of privately owned tank cars would be 1 cent a mile. The figure was based on the average cost of car ownership. In that proceeding the car owners conceded that they were not properly entitled to make a profit on their cars used by the carriers. They demanded, as a rule, that the entire cost to them, together with interest on their investment, should be covered by payment for their use. * * *"

Refrigerator Car Case, 201 I. C. C. 323, the Commission gave particular consideration to the shipper-lessees of cars[9] and pointed out that the rentals charged by the car companies, which are the principal costs of the shippers in connection with the cars, varied greatly, being governed by no principle or rule except that of the severe competition between the car companies. Because of these conditions and others, including the showing that the rentals are "usually fixed sufficiently low so that the mileage earnings [either paid directly, or through the car companies, to the shippers] will exceed the cost to shippers" (201 I. C. C. 323, 381), the Commission found that such payment of allowances to shipper-lessees in effect constituted rebates or concessions from the published rates and it condemned the payment to or "receipt by shipper-lessees of car-mileage allowances in excess of their actual costs, as reflected by their rental payments to the car-owning companies."

In the present case, the Oil Works leased only 50 cars, these being designated as "permanent" cars and the rental called for being $27.50 per car per month. The Car Company, however, agreed to supply such additional cars as the Oil

[9] In *In re Private Cars*, 50 I. C. C. 652, the Commission gave its approval generally to the use by the railroads of cars furnished by the shippers whether the cars were owned by the shippers or leased from the car companies, but the record, apparently, did not disclose the practices in connection with shipper-leased cars which are described in the later *Refrigerator Car Case*, 201 I. C. C. 323.

Works might from time to time need, the rental for these being at the rate of $30 per car per month for the time such cars were in the service of the Oil Works. (See Statement, *supra*, pp. 3–4.) Such an arrangement for a supply of additional cars with rentals based only on the time the cars are in the service of the shipper enables the limiting of the number of permanent cars the shipper would otherwise have to lease to meet its needs and pay for at fixed monthly rentals.[10] It is this, particularly as coupled with a low, competitively-induced basis of rentals, that may result in a "shipper-lessee" receiving concessions from the rates where, as here, the allowances paid to it for furnishing the cars to the railroads bear no relation to its costs in obtaining the cars as reflected by its rental payments.

In the case of the "shipper-lessee" here (the Oil Works), the possibility that the arrangements might have had the above result was recognized by this Court's statement in the *El Dorado Terminal Co.* case, 308 U. S. at p. 432, that "as, upon the face of things as disclosed by this record, the shipper is apparently reaping a substantial profit from the use of the cars, a clear case is

[10] In contrast to this, a "shipper-owner" (a shipper depending upon cars of its own ownership) must own not only as many cars as the ordinary needs of its business require, but, in addition, a sufficient number to meet its maximum needs, with the attendant costs of ownership, including maintenance, taxes, depreciation, and the loss of mileage whenever any of the cars stand idle.

made for the exercise of the administrative judgment of the Commission." That the Court is here speaking of the Commission's exercise of judgment with respect to the allowances for the past involved in the action in assumpsit, is made clear by its immediately succeeding statement that (*ibid.*):

> The Circuit Court of Appeals, without supporting evidence in the record as to any specific items, said that there are obviously other expenses which the shipper must bear over and above the actual rental paid. If this were so, the reflection of those expenses, as well as the rental itself, in the allowance paid by the carrier to the shipper for the use of the latter's cars, would be a matter for the administrative judgment of the Commission and not for determination by a court.

Since there was no question that, so far as future allowances are concerned, the determination of the amount thereof could not be for a court, we believe the Court must have been speaking, not of the prescribing of allowances for the future for publication in the railroads' tariffs, but of the allowances for the past involved in the assumpsit action and over which the one-judge court had in fact assumed jurisdiction. Because the assumpsit action involved only claims relating to the past (see 104 F. 2d 903, 905–906), this Court would not have stayed the one-judge court's hand until the Commission could act unless this Court had de-

cided that Section 15 (13) gave the Commission power over past allowances.

After mentioning (308 U. S. at p. 431), the rules in the railroads' tariffs, which, because of the circumstances described, precluded payment of the published 1.5-cent mileage allowance on tank cars to the Oil Works, the Court makes other statements that make evident that the administrative question of which it is speaking was the amount of the allowance to which the Oil Works was lawfully entitled for past transactions. The Court states in substance (p. 431) that it agreed with the circuit court of appeals that the shipper, the Oil Works, furnished the cars in the present instance and that the Car Company did not, and that the shipper was, therefore, entitled, under the plain terms of Section 15 (13), to be paid by the carrier a just and reasonable allowance. Then the Court departs from the views of the circuit court of appeals, by stating that it was plain that no rule of the carrier may provide for the payment of such allowance to any other person; and that it believed that the consideration in this case that the Car Company acted merely as the collecting agent for the shipper did not remove the case from the Commission's jurisdiction. The circuit court of appeals had held that the shipper-lessee (the Oil Works) was entitled to the full amount of the car mileage allowances collected by the Car Company for the period involved and thus had treated the allowance of 1.5

cents per mile named in the tariffs as properly applicable and payable to the Oil Works." This Court, having just held that this was not the case, in effect further says that the fact that the Car Company had acted, not for itself but merely as collecting agent for the Oil Works did not alter the situation and make the published 1.5 cents mileage allowance the applicable amount, but that it was essentially a situation for the Commission's jurisdiction and determination of the proper amount of allowance payable to the Oil Works for providing the facility. The opinion then states (pp. 431–432) that, "if it should appear that, with respect to the tank cars in question, the shipper-lessee is making substantial profits on leased cars, by reason of the excess of the mileage allowances over the rentals paid, it might in the light of all the facts be found that the shipper is, in the result, obtaining transportation at a lower cost than others who use cars assigned them by the carriers or own their own cars"; that "the Commission has found that, in the case of refrigerator cars, held under similar leases, this has been the case"; and that, "as the tariffs now contain no provision for the payment of car mileage allowances by the railroad to the shipper directly, and as, upon the face of things as disclosed by this record, the shipper is apparently reaping a substantial profit from the use of the cars, a clear case is made for exercise of the administrative judgment of the Commission."

It will be seen that the last statement above again shows that the circumstance making a clear case "for exercise of the administrative judgment of the Commission" is the absence of any tariff provision for the payment of car-mileage allowances to the Oil Works directly. In this connection, it is important to note that, if the exercise of administrative judgment and functions referred to had been the determining and prescribing of allowances for the future, the Commission's authority under Section 15 (13) would have attached regardless of whether there was an existing applicable tariff provision in respect thereof.

The portions of the opinion in the *El Dorado Terminal Co.* case, above discussed, are the ones dealing particularly with the administrative questions arising in the assumpsit action which are pointed to by the Court as administrative questions for the Commission. The appellants, however, in support of their contention that what was referred to was the prescribing of allowances for the future, rely on an earlier discussion in the opinion as to the Commission's general authority in the matter of allowances, which contains the statement that "the Commission is compelled to ascertain * * * a fair and reasonable compensation * * * and prescribe a uniform rate" of allowance (see Br. 13–14). This statement is contained in the following paragraph of the opinion (308 U. S. at pp. 429–430):

As the Circuit Court of Appeals has

> pointed out, different shippers may have differing costs in respect of privately owned cars furnished the carriers. Nevertheless, as the allowances to be made them by the carriers for the use of such cars must be the subject of published schedules, and must be just and reasonable, the Commission is compelled to ascertain in the light of past and present experience a fair and reasonable compensation to cover such costs and prescribe a uniform rate which will reflect such experience. It is inevitable that some shippers may be able to furnish facilities at less than the published allowance while others may find their costs in excess of it. This fact, however, does not militate against the fixing of a uniform rate applicable to shippers properly classified by the Commission.

The appellants, in relying on the above statement with respect to the prescription of future allowances, overlook the fact that the Court is there considering and answering the decision of the circuit court of appeals that the 1.5 cents allowance on tank cars published in the carriers' tariffs applied to the Oil Works. That court had held in effect that, since shippers in furnishing tank cars to the railroads were bound to have differing costs, and that, since the statute in requiring that allowances therefor be published unquestionably recognized this and still contemplated the publishing of uniform allowances (that is, allowances based on average costs), there was nothing

which legally precluded the publishing of the same allowance for all shippers furnishing such cars; and this, the court said, the Commission had itself sanctioned in *In re Private Cars*, 50 I. C. C. 652, by there prescribing a single allowance of 1 cent per mile on tank cars of all kinds and by later raising the rate to 1.5 cents. The circuit court of appeals further said that it "is inevitable if the Congressional intent of uniformity of charge by fixed rates, applicable to all suppliers, is to be attained" that a uniform maximum allowance fixed by the Commission and published in the tariffs will, "in many cases yield a profit to certain shippers." 104 F. 2d at pp. 909, 911.

Applying these views of the circuit court of appeals to the paragraph of this Court's opinion in question (*supra*, pp. 34–35), it will be seen that, in the first sentence of the paragraph, the Court agrees with the circuit court of appeals that different shippers may have differing costs in furnishing cars to the carriers; and it also agrees that, despite this, since the allowance to compensate them must be published and must be just and reasonable, the Commission is compelled to ascertain a just and reasonable compensation to cover such costs and prescribe a uniform rate of allowance reflecting the same. The Court then states that the fact that it is inevitable that the

[11] The court's description of the action taken by the Commission in *In re Private Cars*, 50 I. C. C. 652, is not altogether correct. See 258 I. C. C. at p. 379.

costs of some shippers will be less than the published allowance while the costs of others will exceed it does not militate against the fixing of a uniform rate applicable to shippers properly classified by the Commission.

By this latter statement, we do not understand that this Court has reference simply to the fact that, in the matter of allowances to shippers furnishing cars to the carriers, it is proper and necessary to classify "shipper-owners" and "shipper-lessees" separately, but rather it seems plain that the Court is in general disagreement with the view that there is any such "intent of uniformity of charge by fixed rates, applicable to all [shipper] suppliers" of cars as would require or justify the limiting of the number of published allowances to an extent that the allowances "would in many cases yield a [substantial] profit to certain shippers" (104 F. 2d at pp. 909, 911). "Shipper-owners" of tank cars are separated into classes in accordance with the type of tank cars they require, and there are, doubtless, other ways in which they can be further classified, if necessary to prevent certain of them from reaping a substantial profit from their practice of furnishing cars to the railroads. With respect to "shipper-lessees", it is apparent that it is much more difficult to do this effectively, but, in any event, it seems evident that the paragraph of the opinion in question is principally directed to pointing out that there is no such statutory intent of uniform-

ity of allowance,[12] "applicable to all suppliers" of cars as would require an allowance under which certain shippers would reap a substantial profit out of the published rates. In support of its holding that the published 1.5-cent mileage allowance on tank cars was applicable to, and legally due, the Oil Works, the circuit court of appeals stated that the statutory intent led to that result; this Court's answer was simply to the effect that there was no need for such a conception of the statute in view of the Commission's broad authority in classifying allowances (308 U. S. at p. 430).

Subsequently, this Court, after referring to the fact that the question as to the reasonable allowance due the Oil Works was committed to the Commission's administrative judgment, in effect pointed to the action taken by the Commission in the *Refrigerator Car Case*, 201 I. C. C. 323, as the guide it might properly follow in the case of the shipper here—the Oil Works (308 U. S. at pp. 431–432). In that case, the Commission made no order as to the future but simply condemned

[12] The Elkins Act's purpose of uniformity in rates charged shippers is a different thing from uniformity of allowances paid to shippers out of the rates for supplying facilities of transportation. In fact, individual allowances exactly measuring the costs of particular shippers in furnishing cars would not disturb uniformity of application of the rates, whereas allowances based on average costs do have that effect in varying degree. This Court's opinion indicates that the limitation upon spreading an allowance over average costs is at a point short of the point where it will yield substantial profits to particular shippers.

as unlawful the payment of allowances to shipper lessees in excess of their actual costs as reflected by their rental payments. Here the Commission approved "the principles applied in the *Refrigerator Car Case* as related to the situation * * * involved" (258 I. C. C. at p. 380).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decree of the district court should be affirmed.

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APPENDIX

Section 41 of Title 28, U. S. C. provides:

> The district courts shall have original jurisdiction as follows:
>
> * * * * *
>
> Twenty-eighth. Of cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission.

Section 47 of Title 28, U. S. C. provides in part:

> * * * upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said commission the same requirement as to [three] judges and the same procedure as to expedition and appeal shall apply.

Section 6 (7) of Part I of the Interstate Commerce Act provides:

> No carrier, unless otherwise provided by this part, shall engage or participate in the transportation of passengers or property, as defined in this part, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this part; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff

filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs. (49 U. S. C. 6 (7).)

Section 15 (13) of Part I of the Interstate Commerce Act provides:

If the owner of property transported under this part directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be published in tariffs or schedules filed in the manner provided in this part and shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section. (49 U. S. C. 15 (13).)

Section 1 of the Elkins Act provides in part:

That anything done or omitted to be done by a corporation common carrier, subject to the Act to regulate commerce and the Acts amendatory thereof, which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed

by such corporation, would constitute a misdemeanor under said Acts or under this Act, shall also be held to be a misdemeanor committed by such corporation, and upon conviction thereof it shall be subject to like penalties as are prescribed in said Acts or by this Act with reference to such persons, except as such penalties are herein changed. The willful failure upon the part of any carrier subject to said Acts to file and publish the tariffs of rates and charges as required by said Acts, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine of not less than one thousand dollars nor more than twenty thousand dollars for each offense; and it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said Act to regulate commerce and the Acts amendatory thereof whereby any such property shall by any device whatever be transported at a less than that named in the tariffs published and filed by such carrier, as is required by said Act to regulate commerce and the Acts amendatory thereof, or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall knowingly, offer, grant, or give, or solicit, accept, or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not

less than one thousand dollars nor more than twenty thousand dollars: * * *.

In construing and enforcing the provisions of this section, the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier, or shipper, acting within the scope of his employment, shall in every case be also deemed to be the act, omission, or failure of such carrier or shipper as well as that of the person. Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the Act to regulate commerce or Acts amendatory thereof, or participates in any rates so filed or published, that rate as against such carrier, its officers or agents, in any prosecution begun under this Act shall be conclusively deemed to be the legal rate, and any departure from such rate, or any offer to depart therefrom, shall be deemed to be an offense under this section of this Act. (49 U. S. C. 41.)

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